-1463

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NUMBER 72-1463

CHARLIE JONES,

Petitioner

V.

THRIFT FUNDS OF BATON ROUGE, INC.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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April, 1973

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Reasons for Granting the Writ	6
Conclusion	13
Appendix A (Opinion of Supreme Court of the State of Louisiana)	15
Appendix B (Opinion of Court of Appeal, First Circuit, State of Louisiana)	41
Appendix C (Opinion of Nineteenth Judicial District Court, State of Louisiana)	54

CASE CITATIONS

Ratner v. Chemical Bank New York Trust Co.,
329 Fed. Supp. 270

Buford v. American Finance Co.,
333 Fed. Supp. 1243.

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* * * *

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THRIFT FUNDS OF BATON ROUGE, INC.,

Respondent

* * * *

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

The petitioner, Charlie Jones, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the State of Louisiana rendered in these proceedings on February 19, 1973, rehearing denied March 26, 1973:

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, as yet unreported, appears as appendix A, infra, pp. 15-40, the opinion of the Court of Appeal, First Circuit, State of Louisiana, is reported at 259 So.2d 587, and appears as Appendix B, infra, pp. 41-53; and the opinion of the

Nineteenth Judicial District Court of the State of Louisiana for the Parish of East Baton Rouge is not reported, and appears as Appendix C, infra, pp. 54-60.

JURISDICTION

The judgment of the Supreme Court of Louisiana was rendered February 19, 1973, and petitioner's application for a rehearing was denied March 26, 1973. This judgment became final upon the denial for rehearing. See Appendix A, pp. 15-40, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3) as petitioner claims from respondent the civil liability created under 15 U. S. C. 1640 of the Truth in Lending Act, 15 U. S. C., 1601 et seq., a statute of the United States.

QUESTIONS PRESENTED

Petitioner sues respondent for civil liability created under 15 U. S. C. 1640 for respondent's failure, in connection with a consumer credit transaction by respondent with petitioner, to disclose to petitioner information required under 15 U. S. C. 1639 of the Truth in Lending Act, 15 U. S. C. 1601 et seq. to be disclosed to petitioner. The questions thereby arising are:

1. Whether the failure to disclose by the creditor must be in bad faith, fraudulent or a careless attempt to misinform in order for the borrower to recover the civil liability created by 15 U. S. C. 1640 of the Truth in Lending Act, 15 U. S. C. 1601 et seq.

2. Whether the creditor's misinterpretation of the law excuses the creditor's failure to disclose as required by 15 U. S. C. 1639 of the Truth in Lending Act, 15 U. S. C. 1601 et seq., and exempts the creditor from the civil liability created by 15 U. S. C. 1640 of said act.

STATUTORY PROVISIONS INVOLVED

This case involves Section 130 (15 U. S. C. 1640) of Truth in Lending Act, 82 Stat. 152, (15 U. S. C. 1601 et seq.), which provides in pertinent part, viz:

"Sec. 1640, Civil Liability - Failure to Disclose:

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of:

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

Correction of error within fifteen days

(b) * * *

Unintentional violation; bona fide errors

(c) A creditor may not be held liable in any action under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwith-

standing the maintenance of procedures reasonably adopted to avoid any such error.

Liability of subsequent assignees of original creditor

(d) * * *

Jurisdiction of courts

(e) * * *"

STATEMENT OF THE CASE

Petitioner, in a consumer credit transaction, such as was included in the Truth in Lending Act, 15 U. S. C. 1601 et seq., obtained a loan from respondent on October 22, 1969, in which the total amount to be financed was $187.66 and for which petitioner signed a note in the amount of $1,277.76, secured by a mortgage on his home.

The Truth in Lending Act, 15 U. S. C. 1639, required respondent, in making such loan, to disclose to petitioner, "before the credit is extended" the "total amount to be financed," "the amount of the finance charge," and the "finance charge expressed as an annual percentage rate."

Respondent made a false disclosure statement, purportedly in compliance with 15 U. S. C. 1639 of said Truth in Lending Act, that the total amount of the loan to be financed was $627.00, when in truth the true amount to be financed was $187.66, as was held by the Supreme Court of Louisiana in its opinion in this case. Additionally, respondent in its said **purported** disclosure statement falsely set forth that the amount of the finance charge was $650.70, when, in truth, the finance charge was $1,080.10, as was also so held by the Supreme Court of Louisiana. Further, respondent in said **pur-**

ported disclosure statement set forth falsely that the annual percentage rate of the finance charge was 41% per annum when, in truth, it was 284% per annum, as was also so held by the Supreme Court of Louisiana.

Petitioner is a black man, aged 83 years, and has never attended school, but has learned to read and write.

Section 1640 of 15 U. S. C. of the Truth in Lending Act created civil liability of respondent in favor of petitioner when respondent failed to disclose to petitioner information required to be disclosed under the Statute.

Petitioner sued respondent by reconventional demand, which was filed September 3, 1970, to recover the $1000.00 civil claim and $1,500.00 attorney's fees under 15 U. S. C. 1640, in the Nineteenth Judicial District Court of Louisiana, a court of original jurisdiction. This reconventional demand was filed by petitioner in the suit by respondent against petitioner on said $1,277.76 note.

The district court denied petitioner's claim under the Truth in Lending Act by judgment after a full hearing of the case. Petitioner appealed that judgment to the Court of Appeal, First Circuit, State of Louisiana, which court affirmed the district's court's said judgment. Petitioner then applied for and was granted certiorari by the Supreme Court of Louisiana of this judgment; and after hearing in the Supreme Court of Louisiana, that court affirmed the district court and court of appeal's judgment dismissing petitioner's said claims under the Truth in Lending Act.

REASONS FOR GRANTING THE WRIT

This court has not as yet had an occasion to interpret the meaning of the provisions of Sec. 1640 of 15 U. S. C. of Truth in Lending Act, "fails * * * to disclose." The Supreme Court of Louisiana has decided the meaning of these words of this Section 1640 of 15 U. S. C., which is a federal question, and which question has not here-to-fore been determined by this court.

The meaning of such provisions of this 15 U. S. C. of 1640 is a federal question of substance, as witness the Congressional findings and declaration of purpose in the Truth in Lending Act, 15 U. S. C. 1601.

The above circumstances come within Rule 19 (1) (a) of this court, and indicate the character of reasons which are to be considered by this Court in passing on this application, as is noted by Rule 19 (1)(a).

Also, the Supreme Court of Louisiana has decided this federal question contrary to the only two federal court decisions which have interpreted these words of this Section 1640.

The Supreme Court of Louisiana, after dismissing the respondent's suit on the said note against petitioner, then dismissed petitioner's reconventional demand for his claims under the Truth in Lending Act, and we quote its opinion, viz:

> "Also brought before us by the certiorari granted is the defendant Jones' reconventional demand.
>
> The reconventional demand is founded upon the federal Consumer Protection Act, commonly known as the "Truth in Lending" statute, effective May 29, 1969, 15 U. S. C. 1601 et seq. . By this demand,

Jones seeks recovery of $1,000 penalties and $1,500 attorney's fees for the lender's failure to make a truthful disclosure of the amount financed and of the amount of the finance charges in the 1969 transaction. Section 1640 (a):

The lender Thrift Funds did furnish a statement to the borrower Jones before credit was advanced, as required by such statute. Section 1631, 1639. In purported compliance with Section 1639 (a), subsections (3), (4), and (5) respectively, the disclosure statement noted (a) the amount financed as $627 (i.e., the $522 balance on the old note, plus the $107 cash advance, there being a $2 error in addition), (b) the finance charge as $650.76 and (c) the annual percentage rate as 41%.

The cause of action is essentially based upon Thrift Funds basing its information upon the balance due on the old note being $522 instead of the $128 actually due (after omitting any capitalized interest, forfeited because of the usurious delinquency charges). This information was furnished to the debtor before the credit was extended, as required by Section 1639 (b).

In view of the uncertain and even conflicting interpretations of Louisiana Law on the issue **at the time** the disclosure statement was furnished, we do not find any bad faith or fraudulent or even careless attempt to misinform the debtor by furnishing the information on the basis that the credit extended (and the amount of finance charges and the annual rate) should be calculated upon the balance of $522 allegedly due on the note, without deducting therefrom the capitalized interest forfeited because of the usurious delinquency charges.

Under the present circumstances, we are unwilling to hold that a bona fide misinterpretation of law—where the creditor in fact furnished accurate data

> based upon such reasonable misinterpretation—amounts to an intentional violation of the disclosure requirements. Under Section 1640 (c) 'A creditor may not be held liable (for the civil penalties for false disclosure) . . . if the creditor shows . . . that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error.'
>
> Accordingly, we find no error in the dismissal of the defendant's reconventional demand."

Thus, it can be seen that the Supreme Court of Louisiana has interpreted such words of this U. S. Statute, Truth in Lending Act, to require something more than a **failure** to disclose the information ordered disclosed by the Statute. The Statute does not require any more than that the creditor **"fails"** to disclose, in order to create the civil liability here claimed by petitioner. The Supreme Court of Louisiana said that it did not find any "bad faith or fraudulent or even careless attempt to misinform" petitioner, and the inference from such statement is that the Court interpreted the words "fails * * * to inform" in the statute as requiring bad faith or fraudulent attempt to misinform or careless attempt to misinform by respondent. The Supreme Court of Louisiana then held that respondent made a "bona fide misinterpretation of law" and accordingly, respondent was not liable under this statute, 15 U. S. C. 1640, as the words of the statute "failed * * * to disclose" did not include a failure to disclose based on a claimed error of law.

A review of the provisions of the Truth in Lending Act and the Congressional history thereof discloses the error of the Supreme Court of Louisiana, as witness the

following excerpts from the case of **Ratner v. Chemical Bank New York Trust Co.**, 329 F.Supp. 270, viz:

> "We come to what defendant tenders as its 'good faith defense' under the provision, in §130(c) of the Act, 15 U. S. C. § 1640 (c), absolving from liability a creditor who shows that his **'violation was not intentional** and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.' * * *."
>
> "It is undisputed that defendant carefully, deliberately—intentionally—omitted the disclosure in question. **That defendant, in this court's view, mistook the law does not make its action any less intentional.** This is normally true in criminal cases. (Citations omitted). It surely is the law here."
>
> "This conclusion is buttressed when we note the requirement in the defensive subsection that the error be shown to have been both **'not intentional and (the result of) a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'** The sparse legislative history on this reinforces what the language shows amply by itself—**that the absolution was meant for clerical errors.**[17] A defendant invoking

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"17. The original version of the Senate bill contained no exemption for unintentional or bona fide violations. After businessmen and others complained during the Senate hearings that **mathematical and clerical errors would be inevitable** because of the complexity of annual rate computations. Hearings on S. 5 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 64 ff. 226, 374, 426-427, 529, 698 (1967), and should not subject creditors to liability, id. at 374, **the bill was changed to include the language of the present exemption**—with additional provision for exemption where the error is corrected and adjustments made **'within fifteen days** after discovering the error, and prior to the institution of an action here-

this excuse is required **not merely to show the clerical error was unintentional,** but also that due care has been taken **to set up procedures to avoid it. The provision is wholly inapposite to deal with errors of law like defendant's, though made in entire 'good faith.'**[18] However much clients and others might wish it, nobody has devised—and defendant omits to mention—'procedures' Congress could have envisaged to cover such errors of law."

"C. Finally, defendant argues that its interpretation of the statute was at a minimum 'reasonable,' and that it may not be subjected to a 'penalty' **for what is now held to have been a mistake of this nature.** For the moment, subject to reconsideration when the question of class-action treatment is confronted, this argument may be rejected speedily. Granting that slogans on such subjects too often do service for analysis, **the 'remedial' character of the provision for civil recoveries** quite overwhelms its allegedly 'penal' aspect. Cf. Rex Trailer Co. v. United States, 350 U. S. 148, 76 S.Ct. 219, 100 L.Ed 149 (1956). Damages are liquidated, to be sure, but there is an effective upper as well as lower limit. **Cf. Bostwick v. Cohen, 329 F.Supp. 875 (N. D. Ohio 1970). The aim to protect consumers is the paramount aspect of the statute; the countenancing of 'reasonable'**

"18. It merits emphasis anyhow that the words 'good faith' are defendant's, not from the statute."

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under, or the receipt of written notice of the error.' **The House bill originally required proof of a 'knowing' violation to establish civil liability. This was omitted in the final House version,** apparently in response to objections by the Justice Department that to require proof of 'specific knowledge' might 'frustrate prospective plaintiffs, and thereby weaken the enforcement provisions of the act.' Hearings on H. R. 11601 Before the Subcomm, on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 1, 903 (1967)."

violations would be grossly subversive of that. There are explicitly penal sanctions for the 'unreasonable' violator who behaves 'willfully and knowingly * * *.' § 112, 15 U. S. C. § 1611 Supp. V). And for now, at any rate, we are concerned with only a single plaintiff, suing within a tight (one-year) statute of limitations, § 130 (e), 15 U. S. C. § 1640(e) (Supp. V.), and likely to recover a **sum paltry by any pertinent standard.** While the contexts differ, this court follows the only previously reported decision in holding the provision for civil recoveries **'remedial' rather than 'penal.'** Bostwick v. Cohen, supra."

(Emphasis supplied)

The only other case known to petitioner, which has interpreted these words "fails * * * to disclose" in this Statute, demonstrates the Supreme Court of Louisiana's interpretation of this Federal Statute to be manifestly erroneous. This case is **Buford v. American Finance Co.,** 333 Fed.Supp. 1243, from which we quote, viz:

'The question in these consolidated cases is whether defendants have violated the Truth in Lending Act, 15 U. S. C. § 160 et seq. (1970), by disclosing a notary fee of $1.00 as a separate item on their small loan disclosure statements instead of including the fee in the 'finance charge' and 'annual percentage rate.' The Court finds that they have, and that plaintiffs are entitled to recover the statutory penalty imposed by 15 U. S. C. § 1640 (1970)."

"Since defendants have failed to disclose the 'finance charge' as it is defined by the Act, they have failed to disclose information required to be disclosed under § 1639 and should be liable to plaintiffs under § 1640. However, **defendants claim they are exempt from liability because their liability, if any, was 'unintentional' and was a bona fide error which**

resulted despite their attempts to avoid such error. Under § 1640(c) of the Act,

> 'A creditor may not be held liable in any action brought under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.'

Defendants say that 'intentional' means 'bad faith' and **that they exhibited no such bad faith.** On the contrary, they argue, they **'intended to comply in every respect with the Act,** and to that end their employees attended special seminars on the Act and all the disclosure statement forms were obtained from credit life insurance companies who are supposedly knowledgeable in this field. **The Court cannot accept this arguement."**

"As has been held recently, § **1640(c) is clearly meant to exempt clerical errors** which result despite reasonable safety precautions **and not 'good faith' errors of law such as committed here by defendants.** Ratner v. Chemical Bank New York Trust Co., 329 F.Supp. 270 (S.D.N.Y., 1971). Defendants intentionally imposed the notary fees in these cases, although they mistakenly did not include these fees in the 'finance charge.' **Thus their act was intentional within the meaning of § 1640(c) and not a clerical error. If consumers would be required to prove that creditors were determined to violate the Act in order to prevail, the civil remedy would be a hollow one.** Moreover, all defendants admit they did not seek any legal advice nor did they inquire of the Federal Reserve Board whether their treatment of the notary fees was proper."

"Since § 1640(c) offers no help to defendants, they are liable to plaintiffs under § 1640(a)."

(Emphasis supplied)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Louisiana.

Respectfully submitted,

Ashton L. Stewart
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Baton Rouge, Louisiana 70801
Counsel for petitioner

April_____, 1973

PROOF OF SERVICE

I, Ashton L. Stewart, attorney of record for petitioner, Charlie Jones, in the foregoing petition for certiorari, depose and say that on April _____, 1973, I served a copy of the foregoing petition for certiorari to the Supreme Court of the United States on Robert E. Thompson, II, Liquidator of Thrift Funds of Baton Rouge, Inc., respondent herein, by delivering the same to George R. Covert, Esq., counsel of record for respondent, located at 918 Government Street, Baton Rouge, Louisiana 70802.

All parties required to be served have been served.

Baton Rouge, Louisiana, April _____, 1973.

Ashton L. Stewart
604 Union Federal Building
Baton Rouge, Louisiana 70801
Counsel of record for Petitioner

APPENDIX A
SUPREME COURT OF LOUISIANA
RENDERED FEBRUARY 19, 1973

THRIFT FUNDS OF BATON ROUGE, INC.
Plaintiff-Appellee-Respondent

versus

No.52,065

CHARLIE JONES
Defendant-Appellant-Applicant

Writ of Review to the Court of Appeal, First Circuit, East Baton Rouge Parish.

* * *

TATE, Justice.

The principal issue concerns to what extent, if any, does the exaction of usurious interest by a lender forfeit not only the conventional interest expressed on the note but also the capitalized interest included within its face amount.

The plaintiff ("Thrift Funds") sues upon a promissory note. The maker Jones defends on the ground that the obligation is void as usurious and, in addition reconvenes to recover damages and attorney's fees. The court of appeal allowed Thrift Funds' recovery based on the face amount of the note. In so doing, it reversed the trial court, which had disallowed the capitalized interest included therein on the ground that the lender had exacted additional usurious interest. 259 So.2d 587 (La.App. 1st Cir. 1971). Upon the defendant Jones' application, we granted certiorari. 261 La. 451, 259 So. 2d 910 (1972).

The gravamen of the defendant Jones, complaint is this: The court of appeal sustained the plaintiff finance company's claim that he still owes it $1144.66, plus interest and 25% attorney's fees, as of March 17, 1970, even though he has made payments of $815.10 since borrowing $650 on May 9, 1967, less than three years before, and $100 on October 22, 1969, five months before. The crux of his contention is that the bulk, if not all, of the present balance claimed due is composed of usurious interest sought to be collected from him in violation of Louisiana statutory law.

Facts

The factual context of this litigation is fully set forth by the court of appeal opinion. In summary, this shows:

Thrift Funds was licensed to do business under the former Louisiana Small Loan Law, La. R.S. 6:571-93 (1950).[1] This enactment regulated loans made at an interest rate in excess of the normal maximum conventional rate[2] and permitted licensees to make them at the greater rates prescribed by such small loan law.[3]

Footnote 1.

This law was repealed by Act 454 of 1972, by which was enacted the Louisiana Consumer Credit Law, La. R. S. 9:3509-68. Under this new statute lenders must secure licenses to lend "supervised loans," i.e., those exceeding the present eight per cent per annum, La. R. S. 9:3516(27). See La. R. S. 9:3557.

Footnote 2.

Civil Code Article 2924. This will be discussed in text below. The normal maximum conventional rate provided is 8% per annum.

Footnote 3.

The small loan law authorized between 30% and 42% per annum on loans not to exceed $300.

Jones, a black man aged 83 years, needed $650 to pay a plumbing bill when required by law to connect his house to the city sewerage system. He applied to the plaintiff lender for a loan, this being his first from a finance company. He received his loan, signing a note in 1967 in the face amount of $1152 payable in 48 installments of $24 each. In addition to the $650 loan and $50 closing costs to "his" attorney,[4] the note also included $452 capitalized interest or discount.[5] The note also provided for 8% per annum interest on each monthly installment from maturity until paid.

Between May 9, 1967 and October 18, 1969, Jones had made 28 payments of $24 each (i.e., $672), plus a $10.00 "extension fee" to secure an extension for a missed installment. He thus paid a total of $682.00. The total balance due by finance company records was still $522, since Thrift Funds had deducted a total of $49.20 late charges from the installment payments made. (See below.) Jones' note was fully current as of October 18, 1969.

Footnote 4.

The attorney was furnished by the finance company, and his firm represents it.

Footnote 5.

This represents 32½% per annum interest on the descending balance of a loan of $700. Although the Small Loan Law only authorized maximum 42½% interest on the first $150 and only 30% per annum on the next $151-300, the "protection" of this act did not, however, apply to Jones, since he borrowed in excess of $300. See proviso to La. R. S. 6:585 (1952), prohibiting exaction of greater than 30-42% interest on loans: But "This prohibition shall not apply to any loan the consideration for which is in excess of three hundred dollars."

On that date, Jones needed an additional $100 for a plumbing bill. He applied to Thrift Funds for this sum. Thrift Funds loaned him the $100, "refinancing" the balance of $522 its records showed due on the prior $1152 note, which was then cancelled. Jones received his $100, in return for which he signed a new note dated October 22, 1969 in the amount of $1,277.76 (payable in 48 installments of $26.62 each).

This face amount was arrived at as follows: $100 for the new loan; $7 recordation and cancellation charges; $522, balance of old note extinguished: total, $627 financed ($2.00 error in addition); **plus** finance charges of $650.76, calculated at the rate of 41% per annum. The note bore interest at the rate of 8% per annum on any unpaid balance, commencing at maturity (November 20, 1973) of the note.

On this new note Jones paid five installments of $26.62 each prior to retaining an attorney and making no further payments. These installments were due on the 20th of the month. Since four of them were paid on the 3rd and 4th of the following month, "default charges" of $2.66 (10% of the installment due) were exacted for such payments delinquent by 15 days, i.e., at the rate of 240% per annum upon each delinquent installment. These "default" charges were exacted by virtue of a condition printed on the "loan disclosure statement."[6] Questioning the charges, Jones retained an attorney and paid no further installments.

Footnote 6.

"Default charge: 5% of the amount due and unpaid on any installment in default for each 5 days not to exceed 15."

The "late charges" for the delinquent installments upon the first or 1967 note of $1152 also form a principal basis for the defendant Jones' charge of usury. We will therefore discuss them in detail.

The payments on the 1967 note were due on the 10th of each month. Presumably pursuant to a condition stamped on the face of the payment book,[7] the lender subtracted a "late charge"[8] on 23 of the 28 installment payments, totalling $49.20, additionally charging a $10 "extension fee."[9]

It will be remembered that the note itself only authorized 8% per annum on each installment overdue after its maturity, or 16 cents per month, as contrasted with the $1.20 to $3.60 late charges thus exacted. This

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Footnote 7.

"Additional fees will be charged on an installment 5 days delinquent."

Footnote 8.

5% on installments overdue 5-10 days, 10% on installments due 10-25 days, 15% on installments longer overdue.

Footnote 9.

Seventeen of the installments were made about the 25th of the month and subject to a $2.40 late charge, or (at 10% for 15 days) at the rate of 240% per annum on the overdue installment (which itself included prepaid interest). Six of the installments were paid on or about the 20th of the month, or (at 5% for 10 days) at the rate of 180% per annum on the overdue installment. The remaining $3.60 late charge was for an installment overdue 35 days, or (at 15% for 35 days) at the rate of about 150% per annum on the overdue installment. In addition to the $49.20, a $10.00 "extension charge" was exacted on September 19th, since Jones having missed the June payment was paying an additional $2.40 each on the July, August, and September installments, technically 25 days overdue instead of being timely (due to the missed installment).

is without reference to the circumstance that each installment included capitalized interest and to the prohibition by Civil Code Article 1939 of charging interest upon interest.

The "Late" or "Default" Charges as Usurious Interest

Both the trial and intermediate courts correctly held that the exaction of the "late" or "default" charges constituted usury prohibited by Louisiana law. They disagreed, however, as to the consequences of such usury. In our view, in order to determine the consequences it is necessary to review once again the legal reasons why such delinquency charges constituted the exaction of usurious interest.

At least the 1967 note (and, Thrift Funds claims, also the 1969 note) was exempt from the Louisiana Small Loans law, because this statute regulated only loans of $300 or less. La. R.S. 6:585 (1952). Because of

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Footnote 10.

Civil Code Article 2924 prior to the 1970 and 1972 amendments provided:

"(1) Interest is either legal or conventional. Legal interest is fixed at the following rates, to-wit:

"(2) At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest;

"(3) And on sums discounted at banks at the rate established by their charters.

"(4) The amount of the conventional interest cannot exceed eight per cent. The same must be fixed in writing; testimonial proof of it is not admitted in any case.

"(5) Except in the cases herein provided, if any persons shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and

this, the maximum interest on it chargeable is regulated by Civil Code Article 2924 (1870; amended in 1908).[10] (The 1970 and 1972 amendments do not affect the provisions applicable to the 1969 note.[11])

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recovered within two years from the time of such payment.

"(6) The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond or other written evidence of debt and all interest not beyond eight per cent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent per annum interest or discount; but this provision shall not apply to the banking institutions of this State in operation under existing laws.

"(7) The owner of any promissory note, bond or other written evidence or debt for the payment of money to order or bearer or transferrable (transferable) by assignment shall have the right to collect the whole amount of such promissory note, bond or other written evidence of debt for the payment of money, notwithstanding such promissory note (,) bond or other written evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent per annum; provided such obligation shall not bear more than eight per cent per annum after maturity until paid.

"(8) Provided, however, where usury is a defense to a suit on a promissory note or other contract of similar character, that it is permissible for the defendant to show said usury whether same was given by way of discount or otherwise, by any competent evidence."

Footnote 11.

The amendment by Act 315 of 1970 increased "legal" or "judicial" interest (i.e., in absence of a conventional agreement for more or less) from five to seven per cent per annum. Act 454 of 1972 amendment amended paragraphs 6 (commercial discount loans) and 7 (capitalized interest loans) to make them inapplicable to consumer credit transactions which after January 1, 1973 are regulated by the Louisiana Consumer Credit Law, La. R. S. 9:3509-68 (1972). Note also La. R. S. 9:3503 (1969) had increased the maximum conventional rate to 10% on loans secured by a mortgage on immovable property; however, this increase from 8% was limited to "obligations bearing interest from **date**" as "fixed in writing," thus ap-

Paragraph 4 of this code article (see footnote) provides that "The amount of conventional interest cannot exceed eight per cent." However, paragraphs 6 and 7 provide exceptions relevant to decision of the present issues.

These paragraphs permit recovery of the face amount of a note even if by reason of a discount the eight per cent maximum is exceeded (paragraph 6) or even if the capitalized interest included within the face amount is at a greater rate than eight per cent, "provided such obligation shall not bear more than eight per cent per annum **after maturity** until paid" paragraph 7). (Bold ours.)

In Mayfield v. Nunn, 239 La. 1921, 121 So.2d 65 (1960), we had occasion to review the statutory and jurisprudential history of these two provisions.

Paragraph 6 we declared limited to its legislative purpose of facilitating the sale of discounted notes to raise money, thus limiting it to protection of commercial discounting—the sale of already existing paper at a discount, see Note, 35 Tul.L.Rev. 276 (1960) 121 So2d 69-70. We held paragraph 6 inapplicable to transactions such as the present, where the capitalized interest is included within the face amount of the note.

These latter transactions are governed instead by paragraph 7, which permits recovery of capitalized interest (without limit as to amount) included within the

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parently being intended not to affect the ordinary consumer credit transactions, which for loans in excess of $300 normally capitalize the interest within the face amount of the note and bear interest from **maturity.**

face amount of such obligation, provided (Articles 2924) "such obligation shall not bear more than eight per cent per annum after maturity until paid" (Bold ours). See General Securities Company v. Jumonville, 216 La. 681, 44 So.2d 702 (1950); Huntington v. Westerfield, 119 La. 615, 44 So. 317 (1907); Chadwick v. Menard, 104 La. 38, 28 So. 933 (1900) (review of statutory history); Walker v. Villavaso, 18 La.Ann. 712 (1866); Tarver v. Winn, 18 La.Ann. 557 (1866). See also (summarizing jurisprudence critically): Meadow Brook National Bank v. Recile, 302 F.Supp. 62, 75-76 (1969) (excellent jurisprudential history), Noted, 44 Tul.L.Rev. 832 (1970); Cazales, Usury Law in Louisiana, 14 Loyola L.Rev. 301 (1969); Comment, 39 Tul.L.Rev. 328 (1965); Comment, 5 Tul.L.Rev. 211 (1931); Note, 29 La.L.Rev. 562 (1969).

In **Mayfield**, the $15,000 note included, in rounded figure, a $5,000 bonus capitalized within the face amount, as well as a stipulation for 8% interest from the date on the face amount of the note. The creditor was attempting to recover **both the** capitalized "bonus" of $5,000 and the stipulated 8% interest from date. This court rejected such claim, finding that the "bonus" or "discount" amounted to capitalized interest, so that the attempt of the creditor to collect such amounts was in violation of Paragraph 7 of Civil Code Articles 2924 (which permits recovery of conventional interest in excess of 8% when capitalized and included within the face amount of an obligation, providing such obligation does not bear more than 8% interest **"after maturity"**) and 1939 (which prohibits recovery of interest on interest unless "added to the principal and by another contract made a new debt").

Under the **Mayfield** rationale, in the instant case the

"default" or "late" charges of both the 1967 and the 1969 notes were illegally usurious exactions of interest charges for the delayed payment of money in violation of Civil Code Articles 2924 and 1939.

These charges are clearly "interest" as defined by Civil Code Article 1935: "The damages due for delay in the performance of an obligation to pay money are called interest." They are just as clearly illegal and usurious interest, because collected at a rate far in excess of the 8% per annum from "maturity" **alone** authorized by Article 2924, whenever capitalized interest exceeding the maximum eight per cent is included in the face amount of an obligation as authorized by Paragraph 7.

Such delinquency charges under similar circumstances have been characterized as illegal and usurious by every Louisiana court considering the issue in modern times. See, e.g., Chadwick v. Menard, 104 La. 38, 42, 28 So. 933 (1900) (on rehearing); Gordon Finance Company v. Chambliss, 236 So.2d 533 (La.App. 4th Cir-1970), certiorari denied 256 La. 869, 239 So.2d 869 (1970); Lawrence v. Durr, 195 So.2d 337 (La.App. 4th Cir. 1967); Consolidated Loans v. Smith, 190 So.2d 522, (La. App. 1st Cir. 1936), certiorari denied 249 La. 753, 190 So.2d 913 (1966)) Berger v. DeSalvo, 156 So.2d 323 (La.App. 4th Cir. 1963), certiorari denied 245 La. 86, 157 So.2d 231 1963).

Forfeiture Penalty for Illegal Exaction of Usurious Interest: Entire Interest or Only Usurious Portion?

La. R. S. 9:3501 (1950) flatly provides: "Any contract for the forfeiture of interest in excess of that autho-

rized by law **shall** result in forfeiture of the **entire** interest so contracted."

Both the trial and the intermediate court held that the unambiguous meaning of the statute is to cause the forfeiture of all interest due on the contract, not just the usurious portion of it and not just during the period that usurious charges were exacted. They were correct in so doing.

As the court of appeal noted, the past jurisprudence is in conflict. However, upon examination, the decisions which only disallowed the usurious portion of the interest are not persuasive or controlling.[12] As the decision

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Footnote 12.

Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. 2d 151 (1948) refused to apply the forfeiture provision of Act 291 of 1856, Section 2 (predecessor of La. R. S. 9:3501 (1950), on the assumption that Act 68 of 1903 had repealed it, 38 So. 2d 153; overlooking that this provision of the 1855 act had been continued in the Revised Statutes of 1870, Section 1884, at a time when other portions of the act had been incorporated in Civil Code Article 2924; in any event, the re-enactment by the 1950 Revised Statutes makes such decision uncontrolling. Berger v. DeSalvo, 156 So.2d 323 (La.App. 4th Cir. 1963) limited the forfeiture or usurious interest to periods in which usurious interest was exacted, upon authority of Lalande v. Breaux, 5 La.Ann. 505 (1850)—overlooking that this decision predated the 1855 enactment and concerned Act 25 of 1844 statute (under which the entire interest, even legal interest, was deemed forfeited because of usurious charges, see decisions cited by **Lalande**, Hynes vs. Cobb, 2 La.Ann. 363 (1847) and Richards v. Presler, 2 La.Ann. 264 (1847) and, moreover, concerned an involved situation possibly distinguishable on the facts. Williams v. Halsmith, 17 La.Ann. 200 (1865) disallowed as usurious ten per cent interest and, without explanation, reduced it to the conventional rate of eight per cent instead of disallowing it entirely, but citing only an 1856 act (and thus apparently not consdering the effect of the 1855 act).

notes, the more considered and the more recent decisions have enforced the unambiguous language of the statute that **all** interest due under the contract is forfeited when usurious charges are exacted, in the light of the statute's intent to penalize usurious creditors and to protect borrowers. Crane v. Beatty, 15 La.Ann. 329 (1860); Miley v. Steedley 269 So.2d 470 (La.App. 1st Cir. 1972); Busada v. Goeders, 236 So.2d 669 (La.App. 2d Cir.) (1970); Gordon Finance Company v. Chambliss, 236 So. 2d 533 (La. App. 4th Cir. 1970), certiorari denied 256 La. 869, 239 So.2d 869 (1970); Consolidated Loans, Inc. v. Smith, 190 So.2d 522 (La.App. 1st Cir. 1966), certiorari denied 249 La. 753, 190 So.2d 913 (1966).

Having so concluded, we must nevertheless note that the plaintiff Thrift Funds reminds us that in Mayfield v. Nunn, 239 La. 1021, 121 So.2d 65 (1960), the language of the court (the holding reversed a dismissal on an exception of no cause of action) indicated that, although the usurious interest was disallowed (i.e., the 8% from date provided on the face of the note), the debtor's payments previously made were to be applied to the $15,000 face amount (which included capitalized interest or discount of $5,000). This allegedly indicates that, when remanded for trial, only the additional usurious interest was to be forfeited, not the capitalized interest.

Nevertheless, as the court of appeal noted in **Gordon Finance Company v. Chambliss,** at 236 So.2d 535 cited above, the Mayfield decision did not cite or otherwise take into consideration the mandatory prohibition of La. R. S. 9:3501 that the "entire interest" **shall** be forfeited when a contract exacts interest in excess of that authorized by law. We do not regard this decision

as authority for refusing to apply the unambiguous provisions of La. R. S. 9:3501, since it did not discuss or notice the statute's possible application.

Forfeiture Penalty: What is the "Entire" Interest?

Both the trial and the intermediate court construed La. R. S. 9:3501 as requiring forfeiture of the "entire" interest due on the contract. They differed as to just what was the interest to be forfeited.

The court of appeal held that only the portion of the 1969 note expressly stipulated to be interest (8% from maturity in 1973) was forfeited. It therefore disallowed only such interest, providing instead for legal interest (at 5%) upon the full amount of the note from the 1970 date of demand.

The trial court, to the contrary, reasoned that the "entire" interest forfeited was not only the stipulated 8% interest and the usurious default or extension charges, but also the capitalized interest included within the face amount of the 1969 note. This note, in the amount of $1277.76, included capitalized interest of $650.76. The trial court therefore held that Thrift Funds could recover only the $627[13] advanced, less the $133.10 paid by the debtor, for a net amount of $493.10, plus the 25% attorney's fees as provided by the note. No interest whatsoever was allowed.

Pretermitting (for the moment) the defendant

Footnote 13.

I.e., the $522 balance of the 1967 note, plus $105 new cash advanced.

Jones' further contention that the 1969 note itself is void as violative of the Small Loan Law, the trial court's resolution of this particular issue is correct. The charges for use of the money—whether denoted as interest, whether capitalized within the face amount of the note, or whether denoted as an "extension" or "late" charge—are all "interest" for purposes of determining whether a note is usurious under Civil Code Article 2924. See jurisprudence cited above.

For instance, in Mayfield v. Nunn, 239 La. 1021, 121 So.2d 65 (1960), see p. 70, the reason why the forfeited interest of 8% from **date** was usurious was because it was exacted upon an obligation which also included capitalized interest. It thus violated the prohibition of Civil Code Article 1939 that, except in the case of an instrument bearing interest from **maturity,** interest cannot be charged upon interest. That is, the discount or capitalized interest included within the face amount of the note was as much "interest" as the stipulated 8% interest.

We conclude, therefore, that, when (as here) illegally usurious interest is exacted by virtue of a contractual arrangement, La. R. S. 9:3501 requires the forfeiture of **all** interest under the contract, whether such be stipulated interest, capitalized interest, or other charges for the use of or the delay in paying money, howsoever denoted. We are reenforced in this belief by the proviso to Civil Code Article 2924 provided by the Paragraph 8: "Provided however where usury is a defense to a suit on a promissory note or other contract of similar character, that it is permissible for the defendant to show said usury whether same was given by way of dis-

count or otherwise, by any competent evidence." See footnote 10 above.

Did the 1969 note violate the Louisiana Small Loan Law?

The defendant Jones, however, had appealed from the judgment of the trial court reducing the balance due on the 1969 note to the net principal due, further disallowing any interest. (The trial court judgment had further reserved him the right to sue and recover usurious payments exacted under the 1967 note.) Jones did so on the basis of his further contention that the 1969 note itself is entirely void under the Louisiana Small Loan Law, a contention he re-urges in his application for certiorari which was granted.

The Louisiana Small Loan Law, La. R. S. 6:571-93 (1950), in effect at the time of the 1967 and 1969 transaction, regulated loans in the amount of three hundred dollars or less. La. R. S. 6:572, 583, 585. It provided for maximum rates of 42% per annum (actually 3½% per month) on the first $150 and 30% per annum (actually 2½% per month) on the next $150-$300 loaned. La. R. S. 6:583. The stringent penalty provided for charges in excess of this statutory maximum was that "the contract of loan shall be void and the licensee shall have no right to collect or receive any **principal, interest,** or **charges whatever.**" La. R. S. 6:583.

Both the trial and the intermediate courts considered the 1969 note sued upon as not regulated by the Small Loans Law. They did so because, in addition to the net $105 received, the consideration for the $1277.76 note also included the $522 balance due on the 1967 note

(which, as will be remembered, included both unpaid principal and unpaid capitalized interest), thus amounting to a loan of $622 and (if so) exempted from the protection of the enactment.

The defendant Jones argues, however, that he did **not** receive more than $300—that he only received the $100 new cash loan, $7.00 recordation charges, and (since the capitalized interest on the first note was forfeited due to the usurious charges) the $87.66 of principal amount still owing on the 1967 note; a total of only $194.66, well within the $300 limit of loans regulated by the statute.

Neither the trial nor the intermediate court agreed with Jones' contention. In rejecting it, they relied upon this court's decision in Vosbein v. Leopold, 230 La. 21, 87 So.2d 715 (1956), which summarizes the jurisprudence under Civil Code Article 2924 as holding "that where interest and principal is capitalized in a new note, even though the interest included was usurious, recovery could be had on the note." 87 So.2d 716[13] We pretermit consideration of the defendant Jones' questioning that

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Footnote 13.

The full holding was that, where a **new loan** additionally included usurious interest from an old loan, the full note could be collected. However, it disallowed recovery on another note, which included only usurious interest plus a non-related debt. This is in deference to the jurisprudence holding that a promise to pay usurious interest is not such a natural obligation as will constitute a valid consideration for a new promise to pay. See Rosenda v. Zabriskie, 4 Rob. 483 (1843) and succeeding jurisprudence, such as Chadwick v. Menard, 104 La. 38, 28 So. 933 (1900) and Commonwealth Finance Company v. Livigston, 12 So.2d 44 (La. App. Orl. 1943).

this was the actual holding of the case,[14] because we do not find this decision or those it relies upon as controlling in the present litigation: **Vosbein** and the decisions it cites did not, as does the present case, concern a loan governed by the Small Loan Law, since the amounts loaned were far in excess of $300 and not even arguably within the regulation of this enactment.

In determining whether this loan by a lender licensed to do business under the Small Loan Law was regulated by this enactment, we must first look to its statutory provisions. La. R. S. 6:585 (1952), in effect at the time of the 1969 transaction, provides with specific reference to the present situation: "* * * any new cash advance of three hundred dollars or less may be combined with any other existing **loan or debt** of any amount, whether or not originally made under this (Small-Loan) Chapter, and if the **consideration** of the combined resulting loan or debt exceeds three hundred dollars, such loan shall not be subject to the provisions of this Chapter." (Bold ours.)

In the present case, the $107 newly advanced was combined with the balance due under the 1967 note,

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Footnote 14.

Jones argues that examination of the facts and the actual pleadings in the case indicates that the 18% "usurious" interest included within the new note was actually only capitalzed interest included within the face amount of the previous one. It was therefore valid, not illegal, interest in excess of the conventional maximum of 8%, as authorized by Civil Code Article 2924. Thus, he argues the court did not hold that collection of **illegal** interest could be accomplished by adding a small cash consideration for a new note. In view of our disposition, we do not reach consideration of the merits of this argument.

which was extinguished by novation, Civil Code Articles 2185, 2187, 2189, Sheeks v. McCain Richards, Inc., 226 La. 578, 76 So.2d 892 (1954), by the issuance of the 1969 debt combining the new debt of $107 with the balance due on the 1967 note. However, under the act, the balance due ("the loan or debt") on the old note (which with the "new cash advance" forms the "consideration") is to be valued **before** the new note's execution.

For purposes of determining whether the Small Loan Law Applies, we must first find the value of the "new cash advance" and of the "existing loan or debt" before the new note is executed. That is, the issue is not, as in **Vosbein v. Leopold**, simply to what extent may a note regulated only by Civil Code Article 2924 incorporate usurious interest with a new advance?; for **Vosbein v. Leopold** and the related decisions concerned cash advances not even arguably within the regulation of the Small Loan Law.

In the present instance, the "debt" or the balance due on the 1967 "loan" could not, for the reasons already elaborated, include capitalized or other interest, for **all** such interest charges were forfeited under La. R. S. 9:3501, by virtue of the exaction of the usurious "late" charges. Had, for instance, Thrift Funds sued on this 1967 note, all such interest charges would have been disallowed as forming no part of the loan or debt due.

Therefore (using the terminology of La. R. S. 6:585 above quoted), in valuing the "debt" due on the 1967 "loan" immediately prior to the execution of the 1969 note (for which it, along with the $107 "new cash advance," formed the "consideration"), we must exclude all capitalized and other interest charges. Doing so, we

calculate the value of the 1967 "loan or debt" as follows:

The 1967 note of $1152 included $700 cash and $452 capitalized interest. The date of the note was May 9, 1967, and the first usurious charge was exacted on September 20, 1967, four months and 11 days later—following which, at least, **all** interest charges were forfeited.[15] The charges of $452 for four years' use of $700 on a descending balance amounts to interest at the rate of 32 1/3% per annum, at which rate the interest for four months and 11 days amounts to not more than $85. (Or, assuming most favorably to the creditor an annual rate of 42%, the interest chargeable for the period prior to the usury amounts to not more than $110.)

Thus, deducting (at the most) the $110 interest charges from the debtor's total $682 payments upon the 1967 note, we arrive at net payments made by him of $572. When applied to the original $700 principal, these payments left, at the most, a balance due of $128 owed on the 1967 "loan or debt."

In summary, the total consideration received by Jones for execution of the 1969 note was, at the most, $235—i.e., $107 new cash advance, plus $128 as the value of the existing 1967 loan or debt. This amount being under $300, the 1969 loan was subject to the Small Loan Law.

Footnote 15.

We assume, most favorably to the creditor, that only interest **subsequent** to the usury is forfeited. Under the literal terms of La. R. S. 9:3501, "the **entire** interest . . . so contracted" is forfeited. That is, we assume, without deciding, that **all** interest (capitalized, stipulated, late charges, etc., as discussed **supra**) is forfeited only from the date of the usury, most favorably to the creditor herein.

The exaction of finance charges of $650.76 is clearly far in excess of the maximum rates allowed by Small Loan Law for debts of this amount. Therefore, the 1969 contact of loan is void, and the lender cannot collect any principal, interest or charges whatsoever. La. R. S. 6:983.

We should note that, if usurious charges had not invalidated the capitalized interest on the 1967 note, then the value of the "loan" or "debt" **would** be the face amount due upon the pre-existing debt. Such a construction affords protection to the Small-Loan licensee who exacts only legal charges, but it penalizes those who engage in illegal usury, as intended by La. R. S. 6:983.

Before concluding discussion of this issue, we should refer to two contentions of the creditor:

(1) The creditor argues that, if the debtor had actually paid in cash the note including the usurious interest, he could not sue to recover it back. He then argues that the voluntary novation of the former debt amounts to a voluntary payment so as to bring it within the rule argued for.[16]

However, Commonwealth Finance Company v. Livingston, 12 So.2d 44 (La. App. Orl. 1943), the decision relied upon, does not support this conclusion. After full discussion of pertinent jurisprudential authority, no recovery at all was allowed on the Small-Loan note sued upon, which included both a new cash advance and the

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Footnote 16.

Actually, although obligations may be extinguished by either payment or novation, Civil Code Article 2130, there is a difference between payment, Civil Code Articles 2133 et seq. and novation, Civil Code Articles 2185 et seq.

balance of a prior note refinanced by the second note. One reason for the disallowance of any recovery at all on the note was because the second note provided for interest upon the illegal interest included in the balance due on the first note. 12 So.2d 46, syllabus 2. The decision rejecting the main demand thus supports the conclusion here reached that no recovery may be had under the Small Loan Law for a note on which usurious charges are made by reason of inclusion of illegal interest charges due on a prior note within the face amount of the second note.[17]

(2) In the court of appeal, Thrift Funds contended in brief that the debtor Jones could not attack as usurious payments on the 1967 note which had been made more than two years before the 1970 suit. This arguement apparently relies upon Paragraph 5 of Civil Code Article 2924 (see footnote 10), which provides: "Except in the cases herein provided, if any person shall pay on a contract a higher rate of interest than the above, as

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Footnote 17.

The present plaintiff apparently relies upon the court's holding in rejecting a reconventional demand by the debtor in that case to recover a monied judgment for amounts previously paid on principal. As to this, the court stated, 12 So. 2d 47: "We feel that though because of the law there is no legal obligation to repay any part of such notes as are involved here, there is a natural obligation imposed by conscience and natural justice to repay so much of such loans as was actually received, and if so, then whatever has been paid up to the amount actually received may not be recovered back." See Civil Code Article 1757(2): "A natural obligation is one which can not be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice." The quotation makes it self-evident why this holding is not apposite to the present issue, where the debtor pleads usury as a defense and is not affirmatively seeking a monied judgment to recover back previous payments of principal.

discount or otherwise, the same may be sued for and recovered within two years of the time of payment."

This paragraph provides a prescription against action to **recover** a monied judgment for usury paid. It is not applicable to the present situation, where usury is pleaded as a **defense** to a claim for a monied judgment connected therewith. La. Code Civ. P. Art. 424 provides: "A person who has a right to enforce an obligation also has a right to use his cause of action as a defense. A prescribed cause of action may be used as a defense if it is incidental to, or connected with, the obligation sought to be enforced by the plaintiff." Furthermore Paragraph 8 of Code Article 2924 (see Footnote 10) adds the proviso that "where usury is a defense to a suit on a promissory note or other contract of similar character, that it is permissible for the defendant to show said usury whether same was given by way of discount or otherwise, by any competent evidence." See Miley v. Steedley, 269 So.2d 522 (La.App. 1st. Cir. 1972).

For the reasons assigned, the plaintiff's principal demand seeking recovery on the note will be dismissed.

Footnote 18.

Huntington v. Westerfield, 119 La. 615, 44 So. 317 (1907), indicated that usurious interests previously made in cash, pleaded in defense to a suit on the face amount of a renewed note, were subject to a plea of two-year prescription. If this decision were applicable here, no plea of prescription has been filed in the present suit, so such defense could not have been considered. See La. Code Civ. P. Art. 927; Consolidated Loans, Inc. v. Smith, 190 So.2d 523, 525-26 (1966). The 1907 **Huntington** opinion was apparently legislatively overruled by the 1908 Amendment adding Paragraph 8 to Civil Code Article 2924, which is quoted in the next paragraph of the text.

The Defendant's Reconventional Demand.

Also brought before us by the certiorari granted is the defendant Jones' reconventional demand.

The reconventional demand is founded upon the federal Consumer Protection Act, commonly known as the "Truth in Lending" statute, effective May 29, 1969, 15 U. S. C. 1601 et. seq. By this demand, Jones' seeks recovery of $1,000 penalties and $1,500 attorney's fees for the lender's failure to make a truthful disclosure of the amount financed and of the amount of the finance charges in the 1969 transaction. Section 1640(a).

The lender Thrift Funds did furnish a statement to the borrower Jones before credit was advanced, as required by such statute. Sections 1631, 1639. In purported compliance with Section 1639(a) subsections (3), (4), and (5) respectively, the disclosure statement noted (a) the amount financed as $627 (i.e., the $522 balance on the old note, plus the $107 cash advance, there being a $2 error in addition), (b) the finance charges as $650.76, and (c) the annual percentage rate as 41%.

The cause of action is essentially based upon Thrift Funds basing its information upon the balance due on the old note being $522 instead of the $128 actually due (after omitting any capitalized interest, forfeited because of the usurious delinquency charges). This information was furnished to the debtor before the credit was extended, as required by Section 1639(b).

In view of the uncertain and even conflicting interpretations of Louisiana law on the issue **at the time** the disclosure statement was furnished, we do not find any bad faith or fraudulent or even careless attempt to mis-

inform the debtor by furnishing the information on the basis that the credit extended (and the amount of finance charges and the annual rate) should be calculated upon the balance of $522 allegedly due on the note, without deducting therefrom the capitalized interest forfeited because of the usurious delinquency charges.

Under the present circumstances, we are unwilling to hold that a bona fide misinterpretation of law—where the creditor in fact furnished accurate data based upon such reasonable misinterpretation—amounts to an intentional violation of the disclosure requirements. Under Section 1640(c) "A creditor may not be held liable (for the civil penalties for false disclosure) . . . if the creditor shows . . . that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error."

Accordingly, we find no error in the dismissal of the defendant's reconventional demand.

Decree

For the reasons assigned, the judgments of the court of appeal and of the district court are affirmed insofar as they dismissed the defendant's reconventional demand, but they are reversed in permitting recovery on the promissory note sued upon in the plaintiff's demand; the plaintiff's suit is dismissed, with plaintiff to pay all costs of these proceedings.

AFFIRMED IN PART; REVERSED IN PART.

REHEARING REFUSED
March 26, 1973

SUPREME COURT OF LOUISIANA
A TRUE COPY
March 27, 1973
ANDREW J. FALCON
Deputy

SUPREME COURT OF LOUISIANA

New Orleans, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LA.

On the 26th day of March, 1973 the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARING REFUSED

52,065 Thrift Funds of Baton Rouge, Inc. v. Jones

APPENDIX B

THRIFT FUNDS OF BATON ROUGE, INC.

VS.

CHARLIE JONES

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER 8588

APPEAL FROM THE HONORABLE NINETEENTH JUDICIAL DISTRICT COURT, EAST BATON ROUGE PARISH, HONORABLE LUTHER F. COLE, JUDGE, PRESIDING.

Before Landry, Blanche and Tucker, J J

Landry, J.

Rendered Nov. 10, 1971

Defendant appeals the judgment of the trial court awarding plaintiff recovery upon a promissory note and rejecting defendant's reconventional demand for judgment declaring the entire note void and uncollectible for usurious violation of our "Small Loan Act," and for damages and attorney's fees for alleged violation of the Federal "Truth in Lending Act." Plaintiff has answered the appeal seeking recovery of the amount disallowed by the trial court as usurious, together with attorney's fees thereon. We affirm in part and reverse in part.

Except as hereinafter noted, the facts are undisputed.

On May 9, 1967, appellant executed a note to plain-

tiff aggregating $1,152.00, with interest at the rate of 8% after maturity. Of said sum, $700.00 represented principal consisting $650.00 cash paid one creditor of appellant and $50.00 cash paid another creditor. The balance consisted of $452.00 discounted interest. The note was payable in 48 installments of $24.00 each. Between June 12, 1967, and October 18, 1969, appellant made 28 payments totaling $689.20. Of this sum, $59.20 was charged appellant as 23 delinquent payment charges, and $375.14 was credited to discounted interest duee.

On or about October 22. 1969, appellant contracted a second loan with plaintiff in the sum of $1,277.76, payable in 4 8installments of $26.62 each. The instrument provided for 8% interest after maturity and contained the usual acceleration clause granting the holder the option to demand payment in full upon default of payment of any installment when due. This latter note, the one sued on herein. represented cancellation of the balance of $522.00 due on the prior note, $7.00 advanced by plaintiff for miscellaneous fees. and $100.00 cash advanced to appellant, a total of $627.00, there being a discrepancy of $2.00 in this calculation as noted by the trial court. To the $627.00 (sic) was added $650.76 as discounted interest making the note a total of $1,277.76. Prior to default, appellant made five payments of $26.62, from which late charges of $2.66 were deducted from four of said payments, making a total of $10.64 charged defendant as "late charges." Plaintiff's suit seeks judgment for the balance of $1,144.66, plus 8% interest and 25% attorney's fees to be not less than $30.00 in any event, all as provided for in the note.

Defendant answered contending that the entire loan was void and uncollectible in that it violates the pro-

visions of LSA-R. S. 6:583, a section of our Small Loan Act which is found at LSA-R. S. 6:571, et seq. Alternatively, appellant charges the loan was in violation of 15 U. S. C. 1601, et seq. (May 29, 1969), the Federal and commonly called "Truth in Lending Statute," and consequently, appellant is entitled to damages and attorney's fees as therein provided.

The trial court dismissed appellant's reconventional demand upon finding that the provisions of our own Small Loan Act and the Truth in Lending Statute are not applicable herein. In effect, the trial court found that the interest provided for by the note in question exceeds the 8% maximum legal limit prescribed in LSA-C. C. 1935 in that the four "late payments" thereon constituted interest in addition to the interest provided therein, thereby rendering the interest rate usurious. Relying upon LSA-R. S. 9:3501, which provides that the penality for charging usurious interest is forfeiture of all interest called for in the note, the trial court held that all interest, both capitalized interest and interest due after maturity, was forfeited and awarded plaintiff judgment in the sum of $627.00, the principal of the note sued upon, subject to a credit of $133.10 paid thereon by appellant. Additionally, the trial court awarded plaintiff the contracted attorney's fee of 25%, on $123.47, making a total judgment in favor of plaintiff in the sum of $617.-37. Defendant's appeal seeks reversal of the awards made in plaintiff's favor and judgment in favor of defendant for the amounts claimed in defendant's reconventional demand. Plaintiff has answered the appeal praying for judgment in the amount of the note sued upon.

According to appellant, the principal on the note in

question is only $187.66, the remainder of $1,090.10 being discounted interest. Appellant so concludes on the basis that a balance of only $87.66 was due on the first note when subject note was executed. Appellant maintains that since the former note was for $1,152.00, of which $700.00 was principal and $422.00 discounted interest, and since the late charges paid in the sum of $59.20 also represent interest, usury resulted so that the whole interest is forfeited. In so contending, appellant relies upon LSA-R. S. 9:3501; Gordon Finance Company v. Chambliss, 236 So. (2d) 533, and Busada v. Goeders, 236 So. (2d) 669. Appellant reaches the foregoing conclusion by deducting the forfeited usurious interest of $375.14 from the $1,152.00 face value of the former note and crediting the balance due thereon with admitted payments of $630.00 and conceded late charge payments aggregating $59.20, leaving the asserted balance of $87.66. Appellant then argues that since he received only $100.00 cash when the current note was executed, the total principal of the present loan is only $187.66, leaving a remainder of $1,090.00 as discounted interest. On this basis, defendant maintains that the current loan is less than $300.00, and consequently subject to and in violation of the maximum allowable interest of 3½% per month (42% annually) provided for by our Small Loan Act. Therefore, according to appellant, the entire transaction is void pursuant to LSA-R. S. 9:583. In so arguing, appellant relies upon Liuzza Credit Service, Inc. v. Taliancich, 217 So. (2d) 509, for the proposition that the amount of money actually received by a borrower when a loan is made determines whether the loan falls within the ambit of the Small Loan Act whose provisions apply to loans of $300.00, or less.

Liuzza, above, is inapplicable factually. In Liuzza,

above, the debtor executed a note for $435.36, of which sum he received only $292.29. As a condition for obtaining the note, the debtor was obligated to pay $8.71 for a life insurance policy taken out to further secure the loan. The lender claimed the amount of the policy premium should be added to the amount received in determining the amount of the loan. The court there properly held that the amount received was the determining factor in deciding whether the transaction was subject to the Small Ioan Act's provisions.

The present matter is entirely different. It is conceded a balance of $522.00 was due on the former note when subject note was executed. It is settled law that absent fraud or coercion, and neither has been shown in this instance, the voluntary refinancing of a discounted loan constitutes a willing prepayment pursuant to which the debtor is not entitled to credit for the unearned capitalized interest due and remaining unpaid. Merit Finance Company v. Voorhies, 241 So. (2d) 90.

Although defendant correctly argues the interest on the former note was usurious, it is clear that he waived his right to relief when he voluntarily refinanced the loan and signed a new note including the usurious interest forming part of the prior transaction. Where interest and principal are capitalized in a new note, recovery may be had in full thereon notwithstanding the included interest was usurious. Vosbein v. Leopold, 230 La. 21, 87 So. (2d) 715.

Since appellant paid a total of $689.20 on his original note, of which sum $700.00 represented principal, it follows that a portion of the principal due on the first note remained upaid when the second note was negotiated.

When appellant refinanced the outstanding principal and interest due on the first loan, which amounted to $522.00, said sum in effect became principal on the second note. Said amount, added to the $100.00 actually received by appellant, in legal effect constituted a loan in excess of $300.00, consequently the transaction in question does not fall within the purview of our Small Loan Act. Appellant's claim that the note in question is completely void pursuant to our Small Loan Act is groundless.

The Truth in Lending Act, 15 U. S. C. A. 1601, et seq., in essence requires that all charges, including interest, fees, carrying charges or other costs added as consideration for a loan or deferred payment of account, be itemized and that the total thereof be expressed in an annual percentage rate. See 15 U. S. C. A. 1639 (a). Appellant contends that the Loan Disclosure Statement issued by plaintiff in this instance is false in that the amount financed is stated therein to be $627.00 instead of $187.66 which defendant contends, for reasons given above, was the amount actually financed. Appellant further contends the Loan Disclosure Statement is also false in that it lists a finance charge of $650.76, instead of $1,090.10, which latter amount appellant maintains, for reasons shown above, is the actual finance charge. On this premise, appellant urges that the Loan Disclosure Statement reflects an interest rate of 41% whereas the true rate is 284%.

Appellant's argument is without merit because our law permits capitalization of a balance, including usurious interest, into a new obligation upon which full recovery may be had. Vosbein v. Leopold, above. Under Louisiana law, plaintiff's figures are correct. Since the

true circumstances of the current loan were fully and correctly disclosed on the face of the Loan Disclosure Statement issued in this instance, the lower court correctly found that plaintiff-creditor did not violate the Truth in Lending Act. It follows that appellant's claim for penalties and attorney's fees for alleged violation of the Truth in Lending Act were properly rejected by the trial court.

Appellee and an interested party, the latter my amicus curiae brief, urge that this matter is controlled by LSA-C. C. Art. 2924, and the decision of the Supreme Court in Mayfield v. Nunn, 239 La. 1021, 121 So. (2d) 65.

The cited codal article provides in effect that conventional interest may not exceed eight per cent per annum and that any person paying interest on a contract at a higher rate may sue for and recover that interest within two years from the time of payment except in the following cases:

> "The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond or other written evidence of debt and all interest not beyond eight per cent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent per annum interest or discount; but this provision shall not apply to the banking institutions of this State in operation under existing laws.
>
> The owner of any promissory note, bond or

> other written evidence of debt for the payment of money to order or bearer or transferable by assignment shall have the right to collect the whole amount of such promissory note, bond or other written evidence of debt for the payment of money, notwithstanding such promissory note, bond or other written evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent per annum, provided such obligation shall not bear more than eight per cent per annum after maturity until paid."

Mayfield v. Nunn, above, discusses the history of Article 2924, above, in considerable detail. The decision noted that the first of the above quoted paragraphs of Article 2924 had its origin in Act 161 of 1856, while the second stems from Act 62 of 1860, and that both were incorporated into the Civil Code revision of 1870.

Our review of the pertinent jurisprudence discloses numerous instances in which Article 2924, above, is interpreted to permit recovery of interest in excess of 8% per annum when interest is capitalized into the amount of the note. It is equally well established that interest after maturity may not exceed 8% per annum. See Weaver v. Kearney & Blois, 17 La.Ann 326 (1865); Tarver v. Winn, 18 La.Ann 557 (1866); Mutual National Bank v. Regan, 40 La.Ann. 17, 3 So. 407 (1888); General Securities Co., Inc. v. Jumonville, 216 La. 681, 44 So. (2d) 702 (1950). See La. L. Rev. 565, and 35 Tul. L. Rev. 276.

As noted by the Court in Mayfield v. Nunn, above, the purpose of the first exception contained in Article 2924, above, is to facilitate the sale of notes to raise

money. It therefore appears the first quoted provision refers to the financial practice of commercial discounting, which is the purchasing of an existing indebtedness at less than its face value. The second provision, acording to Mayfield v. Nunn, above, "has been employed through th years as authorizing the capitalizing of interest." The latter provision, therefore, applies to what we understand to be loan discounting or capitalization of interest into the face amount of a loan.

The second exception provided in Article 2924, above, is clearly applicable herein. Of the $1,277.76 face amount of the note in question, $650.76 represents interest, an annual rate of 41% according to the Loan Disclosure Statement issued in connection therewith. Despite the enormity of the rate, it does not violate the usury provisions of Article 2924, above, because it falls squarely within the second exception contained in the applicable article. Plaintiff is therefore entiled to recover the full unpaid face value of the note.

The note also provides for 8% interest per annum from maturity until paid. Interest from maturity does not fall within and is expressly excluded from the two specific exceptions to the usury prohibition contained in Article 2924, above. Defendant made five payments of $26.62, a total of $133.10 on the note. From four of these payments, late charges were deducted.

Plaintiff maintains the trial court erred in considering the late charges interest rendering the transaction usurious. Plaintiff argues that "interest on a loan" is provided for in LSA-C, Art. 2924, which establishes conventional and legal interest and fixes the rates thereof. On the other hand, according to plaintiff, LSA-C. C.

Art. 1935, provides for interest as damages for delay in the performance of an obligation to pay money, and it is in this latter category that late payments fall. Consequently usury, according to plaintiff, is determined solely by the amount of interest charged as such on a loan. On this basis, it is argued that since the late charges were not charged as interest pursuant to Article 2924, above, but as damages pursuant to Article 1935, the interest due from maturity is not usurious and therefore collectible. Finally, appellant contends that Consolidated Loans, Inc. v. Smith, 190 So. (2d) 522, and Gordon Finance Company v. Chambliss, 236 So. (2d) 533, on which the trial court relied, failed to make this distinction.

Consolidated Loans, above, differentiated between late payments which constitute interest and those which do not. On the basis of cited authorities, Consolidated Loans, above, held that late payments made solely for the purpose of obtaining an extension of time to pay constitute interest. The decision also notes that late payments affording the debtor some benefit from the extension, over and above a mere delay in payment or because the creditor suffered a diminution of security, do not constitute interest.

In the case at hand, the late payments afforded the debtor no benefits other than those attending a simple extension of time. Neither has the present creditor shown sufferance of a diminution of its security. We find that the late payments in question rendered usurious the interest stipulated to accrue from maturity.

LSA-R. S. 9:3501 provides that "Any contract for the payment of interest in excess of that authorized by

law shall result in the forfeiture of the entire interest so contracted." This statutory provision is obviously in pari materiae with Article 2924, and the two must therefore be construed together.

A study of past jurisprudence discloses what we deem a hopeless conflict of authority regarding the effect of R. S. 9:3501, above. It suffices to state that the following authorities have held that the penalty for usury is forfeiture only of that portion of the interest which exceeds the legal rate. See Williams v. Halsmith, 17 La.Ann. 200 (1856); Osborne v. Mossler Acceptance Co., 214 La. 503, 38 So. (2d) 151, and Berger v. DeSalvo, 156 So. (2d) 323 (1963). On the other hand, it has been held on numerous occasions that usury operates a forfeiture of all interest tainted by its stigma. Crane v. Beatty, 15 La.Ann. 329 (1860); Barrett v. Chaler, 2 La. Ann. 874 (1847); Busada v. Goeders, 236 So. (2d) 669; Consolidated Loans, Inc. v. Smith, 190 So. (2d) 522; Gordon Finance Company, Inc. v. Chambliss, 236 So. (2d) 533.

Counsel for all parties maintain there is seeming inconsistency between the opinion of this Court in Consolidated Loans, above, and that of the Fourth Circuit in Gordon Finance Company v. Chambliss, above. It is argued that in Consolidated Loans, this court held that late payments resulting in usury operate a forfeiture of interest only for the pay period involved, whereas, in Gordon Finance Company, above, it was held that such payments effect a forfeiture of all interest due under the contract. In Consolidated Loans, above, we held that the late charges paid exceeded maximum interest for the delinquency period, but that because the pay-

ments rendered the interest rate usurious, the entire interest due was forfeited.

We are of the opinion that the legislative probibition against usurious interest, as embodied in LSA-R. S. 9:3501, represents a policy position. The obvious intent of the statute is to afford borrowers some measure of protection from unscrupulous lenders. We likewise note that the tenor of more recent decisions interpreting the statue is to the effect that violation operates a forfeiture of all interest due. We share the view, and so hold. We also hold that plaintiff-creditor is entitled to no interest whatsoever on the note from maturity. The note was for $1,277.76. Appellant made five payments totaling $133.10, which leaves a balance of $1,144.66, for which amount plaintiff is entitled to judgment.

It is ordered, adjudged and decreed that the judgment of the trial court denying plaintiff recovery of capitalized interest is reversed and set aside, and judgment rendered herein in favor of Thrift Funds of Baton Rouge, Inc. against defendant, Charlie Jones, in the sum of $1,144.66, together with legal interest thereon from date of judicial demand, until paid, and attorney's fees of 25% of $1,144.66; all costs of these proceedings to be paid by plaintiff, Thrift Funds of Baton Rouge, Inc.

Affirmed in part_ reversed in part and rendered.

THRIFT FUNDS OF BATON ROUGE, INC.
vs.
CHARLIE JONES

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER 8588

Dec. 20, 1971

ON APPLICATION FOR REHEARING
PER CURIAM

In application for rehearing, appellant maintains that we erred in categorizing his demand for attorney's fees and penalties under the Truth in Lending Act as an alternative demand. Appellant also maintains we erred in holding that the Truth in Lending Act is inapplicable herein and that appellant's right to recover under the Federal Statute depended upon appellant's prevailing upon the issue of alleged usury.

We acknowledge our error in characterizing appellant's demand for attorney's fees and penalties under the Federal Statute as an alternative demand. It was, as appelant states, a separate main demand.

We likewise acknowledge that the Truth in Lending Act is applicable herein in that appellant is not required to prevail upon the issue of alleged usuary to come within the ambit of the Truth in Lending Act. We also find that, for the reasons stated in our original opinion, appellant is not entitled to recovery against appellee under the Truth in Lending Act because no violation of that statute has been shown in this instance.

Our original decree is affirmed and the application for rehearing denied.

APPENDIX C.

THRIFT FUNDS OF BATON ROUGE, INC.
VS.
CHARLIE JONES
NUMBER 143,774 DIVISION G
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

The defendant in this case borrowed money from the plaintiff on two occasions. The first time was May 9, 1967, when he signed a note for $1,152.00 which included $452.00 discount or interest. The balance of $700.00 was consideration received by the defendant in the form of payments to Gaudet Plumbing Company and George Covert in the respective amounts of $650.00 and $50.00. The note was payable in 48 installments of $24.00 each. In addition to the plaintiff crediting various payments upon the account totalling $630.00, it charged the defendant and collected from him twenty-three delinquent charges, these charges being imposed by and presumably sanctioned by language stamped upon the cover page of a collateral document entitled "Payment Coupon Book", introduced into evidence as D-103. The charges totaled $59.20. In the finance business they are variously known as "default", "bonus", "late", "extension" or "delinquent" payments.

The note provided for interest on each installment from maturity at the rate of 8% per annum. It is clear, therefore, that the imposition of the late charges amounted to usury since they were undeniably interest

and in excess of 8% per annum, the legal maximum rate in Louisiana. See Civil Code, Articles 1935 and 2924; Consolidated Loans v. Smith, 190 So.2d 522 (First Circuit, 1966); and, Gordon Finance Company v. Chambliss, 236 So.2d 533 (Fourth Circuit, 1970), writ refused, 250 La. 869, 239 So.2d 364. In Consolidated Loans, supra, citing Berger v. DeSalvo, La.App. 156 So.2d 323, and R. S. 9:3501, the Court held that the plaintiff could collect no interest for the periods covered by the extensions. In Gordon Finance Company, supra, the Court also citing R. S. 9:3501, stated, "The entire interest provided by the contract must therefore be forfeited". Seemingly, the two cases conflict as regards the amount of forfeiture. Perhaps they can be resolved on the basis of whether the late charges are imposed by the promissory note, some collateral documents forming a part of the loan closing, or simply by the lender's policy.

With respect to the loan of May 9, 1967, it is immaterial to a decision in this case. The important thing is that the late payments amounted to usurious interest on the respective installments and a forfeiture of either all or only of 23/48ths of the capitalized discount would have resulted in a balance due on the indebtedness of considerably less than the $522.00 shown to exist on October 22, 1969. It is important to note that all monies paid by the defendant on the loan of May 9, 1967, totaled $689.20, or $10.80 less than the $700.00 actually paid out by the plaintiff for the benefit of the defendant. In other words, all of the principal was not repaid. Thus, on October 22, 1969, when the defendant again negotiated a loan from the plaintiff, any balance of the old account to be refinanced or included in a new note indebtedness

would necessarily include some remaining principal. The defendant urges that with proper adjustments for usury, the remaining balance due on the old loan was $87.66. Be that as it may, under any calculation, some part of the original $700.00 advanced was unpaid.

Testimony shows that on or about October 22, 1969, the defendant contacted the plaintiff for the purpose of borrowing an additional $100.00 The plaintiff's loan manager and the defendant gave somewhat conflicting versions of the manner in which the loan was consummated. A preponderance of the evidence shows that the defendant knew he would wind up with only one account and that the new note would be in the amount of $1,277.00. At page 14 of his deposition, the defendant stated with reference to his signing the new note: "Well, sir, I read it to the best of my ability but at the time when I signed it I didn't pick up my sheet." Offered in evidence by the plaintiff were the note (P-1), ledger card showing payments (P-2), a loan disclosure statement (P-3), and a notice of right of recission (P-4). The defendant admitted his signature on the note and on the loan disclosure statement. The minor conflicts between his deposition, his testimony in Court, and the documents offered in evidence is attributable, we think, at least in part to defendant's advanced years. To make up the amount of the new note the plaintiff cancelled the old note with a stated balance of $522.00, advanced $7.00 for miscellaneous fees, and gave the defendant a check for $100.00. A total of $627.00 (reflecting a discrepancy of $2.00) was added to capitalized discount or interest in the amount of $650.76. The total amount of $1,277.76 was payable in 48 installments of $26.62 each. The note was payable to "Bearer" and provided for interest after

maturity at the rate of 8% per annum. It also contained the usual acceleration clause whereby upon any default, the holder had the option to mature the note in its entirety.

The defendant made five payments of $26.62 upon the note of October 22, 1969. Taken out of four of the payments were default charges (late payments) of $2.66 each. For the same reasons hereinabove stated, we again find that these charges were usurious. We note that they were provided for in the "Loan Disclosure Statement" which was dated the same day as the note and which was also signed by the defendant.

To dispose of the defendant's contention that he was due a rebate of unearned discount on the old note, we cite the case of Merit Finance Company v. Voorhies, 241 So.2d 90 (Third Cir., 1970). That case held that where there is no evidence showing fraud or coercion (and we find none in the instant matter), the refinancing of discounted loans prior to maturity constitutes voluntary prepayment and the debtor is not entitled to credit for unearned capitalized interest.

The defendant pleads in reconvention that the usury with respect to the first loan rendered the balance thereon far below the stated $522.00 which was refinanced and that this, in turn, alters the stated amount of the new finance charge and the stated annual percentage rate of 41%. Without doubt, if the defendant actually owed less than $522.00, the other figures stated in the loan disclosure statement are incorrect. It is argued therefore, that there has been a violation of the Consumer Credit Protection Act, commonly called the "Truth in Lending" statute, effective May 29, 1968, 15

U. S. C. 1601, et seq. This federal act requires, among other things, that all charges which are included in the amount of credit extended be itemized, that there be disclosed the total amount to be financed, the amount of the finance charge and that the finance charge be expressed as an annual percentage rate.

The thrust of defendant's reconventional demand is based on the alleged violation of the aforesaid federal legislation. He prays only for the penalty and attorney fees provided therein for such violations. He has not sought to recover amounts erroneously or unlawfully collected. He urges them only as a defense to the principal action.

We construe the "Truth in Lending" act to require only that the truth be told of the financial details of the transaction however reprehensible they may be to the conscience. If the law of Louisiana permits the plaintiff in this case to capitalize the remaining principal from the old loan together with the usurious interest into a new note and then recover in full the amount of the new note, the defendant fails in his contention that the Truth in Lending act was violated. The truth of the legal status of the transaction will have been stated. We find that the law of our state does permit recovery on capitalized usurious interest and principal. The case of Vosbein v. Leopold, 230 La. 21, 87 So.2d 715 (Supreme Court, 1956) so holds. The doctrine of capitalization as sanctioned in that case applies to the instant situation. Accordingly, the figure of $522.00 is correct under our law for the purpose used and this renders the other figures likewise correct. It is common in the loan industry for a person to refinance his balance many times over a period of many years. If it were not legally possible to recover

on a note into which usurious interest had been capitalized, it would mean that there would be a never ending telescoping effect so that a usurious loan made years ago and refinanced several times without additional usury would nullify the present obligation, do violence to the law of negotiable instruments and be the cause of "Truth in Lending" violations. By including in the note here sued upon the remaining principal and usurious interest of the old loan, the plaintiff had defendant execute a note upon which recovery can be had under the holding of Vosbein v. Leopold. The true facts of the new loan were as stated by the plaintiff. The old balance of $522.00, as capitalized, became a part of the principal of the new loan and hence recoverable.

We have found that the note sued upon provided for additional interest of 8% from maturity and that the "Loan Disclosure Statement" further provided for default charges which are usurious. Specifically, the latter provided for a default charge (late payment) of 5% of the amount due and unpaid on any installment in default for each 5 days not to exceed 15%. Here 10% charges were imposed on four of the installments which were in default over 10 days. The note and the loan disclosure statement must be considered in pari materia to determine the total contractual interest. Under LSA-C. C. 1935 and R. S. 9:3501, the result is that the entire interest so contracted is forfeited. We apply the treatment accorded in Gordon Finance Company v. Chambliss, supra, and allow the plaintiff judgment on the main demand for $627.00, less the sum of $13.10 paid on the account. Judgment will be rendered for the net amount of $493.90, plus the contractual attorney's fees of 25% or $123.47.

The reconventional demand of the defendant will

be dismissed, reserving to defendant any cause of action he may have under Article 2924 of the Civil Code to sue for and recover the usurious interest charged him in connection with the loan of May 9, 1967.

All costs of court herein are to be borne equally by the plaintiff and the defendant.

Baton Rouge, Louisiana, June 9, 1971.

Luther F. Cole
Judge, Division G
19th Judicial District Court

FILED JUNE 9, 1971

Patricia Harmyer, Dy. Clerk of Court